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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 447

WEST TOWNS BUS COMPANY, a corporation of Illinois,

Appellant,

vs.

MARGARET B. LAU,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM.

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The Scheffer Press, Inc.—ANdover 3-6850

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MOTION TO DISMISS OR AFFIRM.

Comes now Margaret B. Lau, Appellee herein and moves to dismiss or affirm this appeal from the judgment of the Supreme Court of Illinois, on the ground that the matters before the court do not present a substantial federal question, and the judgment rests on an adequate non-federal basis.

STATEMENT OF THE CASE.

On May 10, 1952, while Chicago & West Towns Railways, Inc., was in process of reorganization in the District Court, and was being operated by Raymond T. O'Keefe, Jr., a trustee appointed by that court, appellee was injured through the negligence of a bus driver, a servant of the reorganization trustee. On March 9, 1953, she brought suit for damages against the trustee in a State court.

Before the suit could be brought to trial the reorganization proceedings were completed and appellant, a reorganization of the original debtor corporation, took the company over, subject to all claims or obligations incurred during the trustee's operation of the property, and on July 2, 1954, a final vesting order was entered, under the terms of which appellant was charged with and assumed the obligations of the Trustee, as follows, among other things:

"(6) The Company shall have the right, if it so elects, to be substituted at its own cost and expense as a party in lieu of the Debtor or of the Trustee in any or all litigation or proceedings by or against the Debtor or the Trustee or to which either of them were parties, now pending, on appeal or otherwise, or to continue such litigation or proceedings in the name of the Debtor or of the Trustee, and the Trustee shall be relieved of any further duty or responsibility in respect of such litigation or proceedings.

"(7) The Company is authorized and directed to pay, in due course, all costs and expenses of administration of the estate of the Debtor which shall be a charge upon the properties herein authorized to be transferred and conveyed to the Company . . .

"The Company shall assume at the Closing Time and pay in due course without the further order of this Court, the following claims:

"(a) Any claims of creditors entitled to priority by reason of the Bankruptcy Act or of any State or Federal law; . . . .

"(8) From and after the Closing Time there shall be no liability upon the Trustee for any obligations incurred by him in his official capacity as such Trustee growing out of his operation theretofore of the property and business of the Debtor pursuant to the authorizations of this Court, and the Company shall

be and become liable for any and all such obligations and shall indemnify and hold the Trustee harmless against such obligations."

Thereafter on September 21, 1956, and more than four years after appellee's injuries were sustained, a final decree was entered in the reorganization proceedings, and O'Keefe was discharged as trustee (A. 91, 96).

On February 15, 1957, present counsel substituted for counsel theretofore representing O'Keefe, but made no attempt to substitute the corporation in place of the trustee, as defendant (A. 4).

On January 29, 1958, leave was given to appellee to increase the *ad damnum* in her suit from $35,000 to $175,000 (A. 5).

On February 28, 1958, appellee obtained leave to amend her complaint by substituting the corporation as defendant in lieu of O'Keefe, and dismissed the defendant Hathaway (A. 5).

On the same date the defendant, West Towns Bus Company, sought leave to file a so-called counterclaim in which it alleged the following:

"1. That prior to May 10, 1952 and ever since then West Towns Bus Company, counter-plaintiff, was a corporation duly organized and doing business under the laws of the State of Illinois as a common carrier of passengers for hire.

"2. • • •

"3. That at the time and place aforesaid, prior to and at the time of the occurrence of said collision complained of by plaintiff, Counter-plaintiff, West Towns Bus Company, was in the exercise of due care and caution for its own safety and for the safety of others.

"4. Counter-plaintiff, West Towns Bus Company owed plaintiff, as a passenger on one of its buses, the highest degree of care; that counter-plaintiff, if guilty of negligence, would only be guilty of a passive or technical negligence and is, therefore, entitled to indemnity from the counter-defendant, William Hathaway, who was guilty of active negligence or omissions which constituted the proximate cause of the injuries to the plaintiff, Margaret B. Lau." (R. 51, 52, 53, A.A. 1)

On April 1, 1958, West Towns Bus Co. moved for leave to file its appearance and answer, setting up the statute of limitations, and insisting on its non-liability since it was not a party to the original complaint (A. 6, 12). This motion was denied (A. 14), and it was ordered that the appearance and answer in behalf of O'Keefe stand as the appearance and answer in behalf of West Towns Bus Co.

On the same day the appellee filed an amended complaint, setting up the same cause of action as originally pleaded but naming West Towns Bus Co. as defendant instead of O'Keefe (A. 12, 14).

It is averred that plaintiff on April 1, 1958, filed an amended complaint containing "new specific allegations of negligence." The Illinois Supreme Court has held that new allegations of negligence may be filed after the limitations period has expired, provided they pertain to the same transaction or occurrence. (*Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 15 N.E. 2d 838 decided in 1938.) This Court reached the same conclusion in *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574.*

* Sec. 46(1), Chap. 110, Ill. Rev. Stat. provides as follows: "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or defendant, changing the

1

Appellant's claim that the amendment increasing the ad damnum was repugnant to the Bankruptcy Act.

Appellant states that Chapter 10 of the Bankruptcy Act requires that there should be disclosure to the district court of the maximal liability on all claims against the estate. Appellant fails to point out the particular Section of the Act which is relied upon; we submit that nowhere in the Act is there any provision requiring a person, injured by the Trustee's servants during the operation of the business of the debtor, to make complete disclosure of the ultimate, maximum liability of the Trustee, under penalty of having the injured person's claim reduced in amount. When the Trustee injures a person during his conduct of the business, that person becomes vested with the rights that any other injured person has against any other tort feasor, and may enforce them in the same manner and to the same extent.

No showing has been made that the appellant considered appellee's claim in determining whether it would take over the system. No showing has be a made that the appellant ever contacted the appellee, or instituted any inquiries as to the nature or extent of her injuries, or had any interest whatever in the subject.

The amendment increasing the *ad damnum* was permitted in accordance with the long standing rule in Illinois.

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*(Continued)
cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross demand."

Section 34, Chap. 110 Ill. Rev. Stat.* permits such an amendment. The argument is made that this Section was adopted after the appellant's rights had accrued; however, this Section merely codified the existing Illinois law as exemplified in *Tomlinson* v. *Earnshaw*, (1884) 112 Ill. 311 and *Geneva Construction Co.* v. *Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 122 N.E. 2d 540, decided in 1954.

It has many times been held that statutes enlarging a remedy already existing do not offend vested rights; that no one has a vested right in rules of practice or modes of procedure (*Grivas* v. *Parmelee T. Co.*, 207 Fed. 2d 334, 347 U.S. 913.) It has also been held that no one has a vested right in the statute of limitations (*Chase Security Corp.* v. *Donaldson*, 325 U.S. 304). In taking over the estate from the trustee the company acted with knowledge of this right accorded to the plaintiff under the Illinois law for almost 80 years. Additionally, the Illinois law affords ample avenues of discovery under which the defendant could apprise itself as to the exact nature, condition and extent of the plaintiff's injuries. No showing is made that appellant ever was influenced in its actions by the amount of the *ad damnum*, or even knew what it was.

Appellant repeatedly makes the statement that the claim of the appellee has no priority and was not an operating expense. In support of this position *Brooks* v. *St. Louis & San Francisco Ry. Co.*, 180 F. 2d 185 and *In re New York N.H. & H. R. Co.*, 92 F. 2d 428 are cited. In each of these cases the tort inflicted on the claimant

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* Sec. 34, Chap. 110, Ill. Rev. Stat.: . . . "Except in case of default, the prayer for relief does not limit the relief obtainable . . ."

occurred prior to receivership; in our case the bus which injured appellee was operated by O'Keefe, reorganization trustee. It is well settled that damages for injuries to persons or property during a receivership, caused by the torts of the receiver's servants, are classed as a part of the operating expenses and are entitled to the preference accorded such claims. (*McCullough* v. *Union Traction Co.*, 186 N.E. 300, 206 Ind. 585; *Beale* v. *Moore*, 32 S.E. 2d 696, 183 Va. 519; 75 C.J.S. 943; *Bartlett* v. *Cicero L H & P Co.*, 177 Ill. 68, 52 N.E. 339). It is further settled that claims for receivership expenses have precedence over the mortgage bonds of the debtor. (*Union Trust Co.* v. *Illinois Midland Ry. Co.*, 117 U.S. 434, 464, 481; *Burke* v. *Morphy*, 109 F. 2d 572, cert. den. 310 U.S. 635.) Therefore it is immaterial whether the lienholders of the reorganized company took into account the *ad damnum* in appellee's lawsuit, since it had priority over their liens in any event. The security holders did not and could not "change their position" relative to appellee's claim. Furthermore, the security holders are not parties here, and are not complaining.

Attention is called to the statement in the Illinois Supreme Court's Opinion that the amount awarded plaintiff might be in excess of the amount which the court would have awarded had it made the original determination. Appellant cites *Foust* v. *Munson Steamship Lines*, 299 U.S. 75, apparently in an effort to show that the Illinois courts failed to do their duty.

It is clear from the Opinion of the Illinois Supreme Court that the question of whether the damages were excessive was considered and passed upon. It is not open here.

In increasing the *ad damnum* prior to trial, plaintiff was only exercising the right granted uniformly to plain-

tiffs in Illinois for many years, a right of which appellant was well aware. Appellant has failed to show any injustice as a result of plaintiff's exercise of this right.

2

Appellant's claim that the holding of the state court that the state two-year limitation statute should not be applied here because an amendment to the state practice act adopted after the Consummation Order would make such amendment invalid as repugnant to the Bankruptcy Act.

This question is based on a series of false assumptions. As we have seen, appellant took over the estate of the debtor burdened with the claims for operating expenses, of which plaintiff's claim was one. At the time of the Consummation Order, July 1, 1954, the time for bringing suit under Illinois Statute of Limitations had already expired. Consequently, the defense of the Statute, if it ever existed, was as valid the day of the Consummation Order as it is today. Counsel is in error in assuming that the two-year period under the statute would commence at the date of the order. In Illinois, the statute begins to run the day of the accident. (Sec. 1.11, Chap. 131 Illinois Revised Statutes; *Roth* v. *Lundin*, 237 Ill. App. 456.) Therefore appellant is forced into the anomalous position of asserting that it accepted liability for operating claims of the debtor corporation, at the same time asserting their invalidity as to it. Appellant urges the inequity of requiring it to assume a claim in an amount larger than the *ad damnum;* is it to be assumed that the bankruptcy court would have permitted appellant to take over the debtor estate, had it known that appellant would thereafter repudiate its obligations thus assumed?

Appellant asserts that the record does not show an express assumption of obligations by it, which, it claims,

was required by the order. The order provides that the Trustee is relieved of liability for all obligations incurred in the operation of the property, "and the Company shall be and become liable for any and all such obligations." No express assumption, other than that contained in the order, was required. The appellant became liable by accepting the property under the conditions prescribed by the order.

3

Appellant's claim that the imposition of liability following the transfer of assets is repugnant to the Bankruptcy Act.

Appellant here first repeats the fallacy, already exposed, that appellee's claim was not an operating expense. Under Point I we have cited the authorities holding to the contrary and have shown that the *Brooks* case, cited by appellant is not in point.

Since appellee's claim is an operating expense, it clearly falls within the class of liabilities specifically imposed on appellant under the Consummation Order; no proof was necessary that this claim was specifically mentioned in that order.

The liability in this case was essentially against the fund in the hands of the trustee, and not against the custodian. Regardless of devolution of title, the liability followed the fund. *McNulta* v. *Lochridge*, 137 Ill. 270, 27 N.E. 452, affirmed 141 U.S. 327. *Bartlett* v. *Cicero Light Co.*, 177 Ill. 68, 52 N.E. 339.

A similar point was raised in *McNulta* v. *Lochridge*, 141 U.S. 327, and this court held that whether a successor receiver can be held liable for his predecessor's torts did not present a Federal question.

Appellee in this case followed the only course which it was possible for her to pursue. She filed a suit promptly against the person responsible for her injuries. At that time the present appellant corporation was not in existence, nor was it created at any time within the two-year statute of limitations. When the trustee who had injured her was discharged, he no longer was liable for her injuries. If she filed a new suit against the present appellant, the statute of limitations would have been pleaded. The only possible course for her to adopt was to have the appellant (who already was defending the suit) substituted as party defendant.

It is submitted that nothing in the Bankruptcy Act was contravened by the procedure adopted in this case, and this appeal should therefore be dismissed for lack of a substantial federal question.

Respectfully submitted,

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